



Decision

Matter of: Johnston Engineering, Inc.

File: B-258180

Date: December 16, 1994

Jack East III, Esq., for the protester.
Lester Edelman, Esq., Department of the Army, for the agency.
Behn Miller, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Bid was properly rejected by agency as nonresponsive where accompanying bid bond referenced incorrect solicitation number of an ongoing procurement for similar construction work, and the bond's penal amount exceeded the required indemnification of 20 percent of the total bid price.

DECISION

Johnston Engineering, Inc. protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. DACW03-94-B-0104, issued by the Army Corps of Engineers for the demolition and reconstruction of a restroom facility at Piney Bay Park located at Lake Dardanelle, Arkansas. The Army rejected Johnston's bid because the bid bond submitted referenced a different solicitation number. In its protest, Johnston contends that the agency should have waived the defect because the bid bond nonetheless correctly identified this requirement's bid opening date, and because the referenced solicitation number only differed from this requirement's solicitation number by one digit.

We deny the protest.

The IFB was issued by the Army on July 1, and required bidders to submit a bid deposit equal to 20 percent of the total bid price. At the August 2 bid opening, five bids--including Johnston's--were received. Although Johnston was the low bidder, its bid bond listed solicitation No. DACW03-94-B-0109, rather than the correct solicitation number of DACW03-94-B-0104. In this regard, the "0109" IFB number listed by Johnston actually referred to an IFB issued by the Army to construct a restroom facility at Greers Ferry Lake

in Arkansas; the bid opening for the Greers Ferry Lake procurement was scheduled for August 10.

The submission of a required bid bond or bid guarantee is a material condition with which a bid must comply at the time of bid opening to be responsive since this instrument is designed to protect the government's interests in the event of a bidder's default. Blakelee Inc., B-239794, July 23, 1990, 90-2 CPD ¶ 65. The sufficiency of a bid bond depends on whether the surety is clearly bound by its terms; where the liability of the surety is not clear, the bond is defective. Techno Eng'g & Constr., Ltd., B-243932, July 23, 1991, 91-2 CPD ¶ 87. If at the time of bid opening it is uncertain whether the bidder has furnished a legally binding bond, the bid must be rejected as nonresponsive. Federal Acquisition Regulation § 28.101-4(a); A & A Roofing Co., Inc., B-219645, Oct. 25, 1985, 85-2 CPD ¶ 463.

The solicitation number referenced in a bid bond is a material element of the bond affecting its acceptability. Joseph B. Fay Co., B-241769.2, Mar. 1, 1991, 91-1 CPD ¶ 234. A bid bond that cites an incorrect solicitation number may nevertheless be acceptable where there are clear indicia on the face of the bond that otherwise identify it with the correct solicitation. For example, in Kirila Contractors, Inc., 67 Comp. Gen. 455 (1988), 88-1 CPD ¶ 554, we held that a bid bond was acceptable despite showing an incorrect solicitation number where the bond referenced the correct bid opening date and where there were no other ongoing solicitations to which the bond could refer. However, where the bid bond contains an incorrect solicitation number which actually cites an ongoing procurement the bid must be rejected as nonresponsive--even if the bid bond references the correct bid opening date--since, on its face, the bond appears to be enforceable against the surety for another actual procurement. See Kinetic Builders, Inc., 65 Comp. Gen. 871 (1986), 86-2 CPD ¶ 342, aff'd, Fitzgerald & Co., Inc.--Recon., B-223594.2, Nov. 3, 1986, 86-2 CPD ¶ 510.

The facts in this case are substantially the same as those in Kinetic Builders, Inc., supra. As in Kinetic, here the solicitation number set forth on the bid bond submitted by Johnston referred to another ongoing solicitation which described a nearly identical restroom construction project. In addition, the \$34,000 penal amount of Johnston's bid bond exceeded the required 20 percent of Johnston's \$136,000 bid. The correct 20-percent bid bond amount would have been \$27,200. In sum, Johnston submitted a bid bond which listed a solicitation number for another similar construction project for which bid opening had not yet been held, and which was for an amount that did not correspond to the required 20 percent indemnification.

Under these circumstances, an ambiguity existed on the face of Johnston's bid bond, and it could not be sufficiently identified to the IFB to be enforceable against the surety for this requirement. Accordingly, Johnston's bid was properly rejected by the agency as nonresponsive due to a defective bid bond. Id.

The protest is denied.

\s\ Paul Lieberman
for Robert P. Murphy
General Counsel

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The protest is denied.

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